IN THE HIGH COURT OF BOMBAY AT GOA
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FIRST APPEAL NO. 108 OF 2003
WITH CIVIL APPLICATION NO. 104 OF 2003

Shri Madhav Narayan Naik
Kundaikar, major, married,
Builder, r/o H.No.295,
Dasolvada, Cundaim,
Ponda, Goa. ... Appellant

Versus

1. Smt. Abida Bi, wife
of late Mullam Focruddin
Muzawar, major, housewife,

2. Shri Mullam Abdul Nassir
Muzawar, major, service,

3. Mrs. Yasmeen Muzawar,
w/o Shri Mullam Abdul Nassir
Muzawar, major, housewife,

4. Smt. Mariam Bi Shaikh,
major, married, Indian
National,

5. Shri Shaikh Abdul Kadar,
major, married, Indian
National,

6. Smt. Zaruba Bi Khan,
major, married,
Indian National,

7. Shri Salauddin H. Khan,
major, married, Indian
National, plaintiff no. 1 to
7, r/o Curti, Ponda, Goa,

8. Smt. Safina Agha, major,
maried, Indian National,

9. Shri Tajuddin Aga,
major, married, Indian
National, both r/o Mangor
Hill, Vasco da Gama, Goa,

10. Smt. Aminabi Carol,
major, married, Indian
National,

11. Shri Shaikh Issuf Carol,
major, married, Indian

National both r/o Duler,
Mapusa, Goa,

12. Smt. Riza Bi Shaikh,
major, married, Indian
National,

13. Shri Issuf Shaikh, major,
married, Indian National,
r/o House No.26, Bazar
Mol, Curti, Ponda, Goa, and

14. Shri Joseph D'Souza, major,
married, Builder, r/o
Sequeira Bldg., Opp.
Syndicate Bank, Dhavali,
Ponda, Goa.

Shri Premanand A. Kholkar, advocate for the appellant.

Shri R. G. Ramani, advocate for respondent nos. 1, 3, 4, 5, 8, 9, 11 and 12.

Shri Shivan G. Dessai, advocate for respondent no. 14.

CORAM : F. I. REBELLO &
P. V. HARDAS, JJ.

DATE : 21st July, 2003.

ORAL JUDGMENT (Per Rebello, J.)

Admit. Heard forthwith. Records and proceedings have been called.

This is a suit which was filed before the amendment to the Civil Procedure Code by the Acts of 1999 and 2002 which came into force on lst July, 2002. One of us Rebello, J. in Writ Petition No.209 of 2003 in the case of **Jerry A. Braganza & Others vs. Smt. Rajeshree alias Rayeshri R. Borkar & Ors.** decided on July 10, 2003, has taken the view that strict compliance of the provisions of Order 8 of the C.P.C. as amended, would not apply to suits filed before the amendment, unless the Court notifies the parties that the written

statement will have to be filed within a time frame of 30 days or extended time frame of 90 days. We may gainfully reproduce the discussion as under:-

> 4. Having heard the Counsel, the real issue would be whether on facts and circumstances of the present case, the trial Court has failed to exercise the jurisdiction vested in it and whether the order discloses an error apparent on the face of the record. On a suit being filed, summons have to be issued to the defendants by the Court. While considering the issue, which is in issue, provisions of the Code of Civil Procedure (Amendment) Act, 1999 and the Code of Civil Procedure (Amendment) Act, 2002 will have to be considered. The Amendments came into effect from 1.7.2002. Order 5, Rule 1, before its amendment, by Act of 1999, did not provide for any time limit for filing the written statement. After the amendment, Order 5, Rule 1 read as under:
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> ' (1) When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, on such day within thirty days from the day of institution of the suit as may be specified therein:
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> Provided that no such summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim:
>
> Provided further that where the defendant fails to file the written statement on the said day, he shall be allowed to file the same on such other day which shall not be beyond thirty days from the date of service of summons on the defendant, as the Court may think fit.'
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> The next relevant Rule to be considered is Order 8, Rule 1. Before the 1999 amendment, again there was no time frame within which a defendant was directed to file written statement. Order 8, Rule 1 which came to be substituted by the Act of 1999, read as under:
>
> '1. Written statement. - The

defendant shall at or before the first hearing or within such time as the Court may permit, which shall not be beyond thirty days from the date of service of summons or the defendant, present a written statement of his defence.'

Section 32 is a provision pertaining to repeal. In so far as Section 32,(2),(j) of the 1999 Amendment Act, the same reads as under :

'(j) the provisions of Rules, 2, 6, 7, 9, 9-A, 21, 24 and 25 of the Order V of the First Schedule as amended or, as the case may be, inserted or omitted by Section 15 of this Act, shall not apply to any summons issued immediately before the commencement of section 15;'

Similarly, Section 32(2)(l) reads as under :

' The provisions of rules 1 and 1-A of Order VIII of the First Schedule, as substituted or inserted by section 18 of this Act, shall not apply to a written statement filed and presented before the Court immediately before the commence of section 18;'

We then have Amendment Act of 2002 which again substituted Order 5, Rule 1 which substituted Orver V, Rule 1, of the Amendment Act of 1999 by the following sub-rule :

'When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant.

Provided that no summons shall be issued when a defendant has appeared at the presentation of plaint and admitted the plaintiff's claim.

Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of

summons.'

Similarly, by Section 9 of the Amendment Act of 2002, Order 8, as amended by Section 18 of the Amendment of 1999, was substituted. Rule 1 as substituted reads as under:

' The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.'

Section 16 is a repealing provision. It does not refer to Order 5 or Order 8 as substituted.

Section 1(2) sets out that it shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of the Act and for different States or for different parts thereof. Both the Amendment Acts were notified and came into force from 1.7.2002.

5. Admittedly the suit was not filed on or after 1st July, 2002, but was pending before the Court before 1.7.2002. In these circumstances, it will have to be considered whether the Amendment to Order 5, and Order 8 would apply in so far as pending suits are concerned. It may be clarified that so far as the Amending Act of 1999 is concerned, as already noted, those provisions shall come into force on the date to be notified. Order 5 of Rule 1 and Order 8 of Rule 1, however, came to be substituted by Amendment Act of 2002. The repealing provision does not provide for any saving. Section 1 of the Amendment Act provides that it will come into force on such date as may be notified. In the instant case, on 1.7.2002, in these circumstances, the Court will have to address itself to the question whether the amended provisions of Order 5, Rule 1 and Order 8, Rule 1 will apply to suits which

were pending. The question really is whether in cases of pending proceedings where written statement is not filed, is there jurisdiction in the Court to grant time beyond the period prescribed. Attention has been invited to a Judgment of a Single Judge of this Court sitting at Nagpur in Writ Petition No.4219 of 2002. That was a suit filed under the Hindu Marriage Act, 1955. The suit seems to have been filed before the Amendment Act came into force. Section 21 of the Hindu Marriage Act 1955 provides that all proceedings under the said Act shall be regulated, as far as may be, by the Code of Civil Procedure. It is in that context that the learned Judge considered Order 8, Rule 1 and held that the written statement has to be filed in terms of the mandate and it is to be strictly complied with. The real controversy is whether it would apply to pending proceedings, was really not answered.

6. It is a cardinal rule of our jurisprudence that procedural provisions are not meant to thwart the course of justice, but to advance it. Keeping those objectives in mind, the Court will have to consider whether and to what extent the provisions of the Code of Civil Procedure, in so far as filing of the written statement is concerned, have to be read as mandatory or directory. It is no doubt true that filing of written statement is a step in the proceedings. The relevant orders reproduced would indicate that it was the intention of Parliament that the provisions have to be read together. In the first instance, in the matter of filing of the written statement one will have to consider the provisions of Order 5, that is the provision under which the Court is bound to issue summons to the defendant calling upon him to file the written statement. Under Order 5, as substituted by the Amendment Act of 2002, it is the duty of the Court while issuing summons to call upon the defendant to file written statement within 30 days from the date of service of summons on the defendant. There is a further proviso which sets out that if the defendant failed to file written statement within 30 days, he shall be allowed to file the same on such other day as may be specified by the Court, for the reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons. In other words, there is a mandatory duty cast on the Court while issuing summons to bring it to the notice of the defendant to file written

statement within thirty days or within the extended period of 90 days. We then have the proviso of Order VIII, Rule 1 for filing of written statement. The terminology of Order 8, Rule 1 is similar to that in Order V, namely that the defendant, shall within thirty days from the date of service of summons on him, present a written statement of his defence. The proviso is similar. The Court, in its discretion, can extend the time not later than 90 days from the date of service of summons. The rule as amended, therefore, provides for a mandatory duty on the Court to notify the defendant that he has to file a written statement within 30 days of service of summons and further provides that the Court has jurisdiction in such an event to extend it at any rate not beyond 90 OBays period. The reading of the provision would, therefore, show that unless summons in terms of Order 5, Rule 1 has been served on the defendant calling upon him to file written statement within 30 days, it will not be possible to read in Order 8 that the defendant has to file written statement within 30 days or within the extended period of 90 days from the date of service of summons. If that be so, it will be open to the Court to either call upon the defendant to file written statement within 30 days or extended period of 90 days and only after such direction, the Court would cease to have jurisdiction to exercise discretion to extend time. In other words, unless a party is notified by the Court that he has to file the written statement within 30 days or extended period of 90 days, there will be discretion in the Court to permit filing of the written statement even beyond the extended period of 90 days, if the suit was instituted before coming into force of the Amendment Act of 2002. The learned Single Judge sitting at Nagpur has not taken note of the provisions of Order 5. It may also be necessary to refer to the amended provisions as contained in the Act of 1999, and more specific Section 32 (j) and (l) which provides that they shall not apply to summons already issued and written statement already filed. In other words, the summons, in terms of the amendment, need not have been served. However, that Rule was substituted by the Act of 2002. The Amendment Act of 2002 does not provide for any such saving, as was provided in so far as Act of 1999 is concerned. The Amendment of 1999 was already law and had become a part of the C.P.C. and consequently, would have been made applicable if notified. Before its

notification, by Act of 2002, it came to be substituted. The Amendment Act of 2002 also has a repealing provision. The repeal clause did not cover the new substituted Order V, Rule (1) or Order VIII, Rule (1), unlike what was provided in the Act of 1999. It is, therefore, clear that in so far as Act of 1999 is concerned it could have been construed that summons need not have been served as required under the Act of 1999, in respect of pending suits, but that would not be the position under the Act of 2002 as Section 32 of the Amendment Act of 1999 will not apply to in so far as the amendment brought about by the Act of 2002. My attention was invited to the Judgment of the Apex Court in the case of **Dr. J.J. Merchant and Others vs Shrinath Chaturvedi, (2002) 6 SCC 635.** There the Apex Court was considering the provisions of the Consumer Protection Act, 1986. It is again a rule of interpretation that even an interpretation of cognate legislation need not be necessarily be followed unless they are in **pari materia** and considering the object of the statute. There are similar provisions, under the Industrial Disputes Act, 1947. Rule 10-B, sub-Rule (2) of the Central Rule, provides that after statement of claim is furnished to the other side raising the dispute, the Tribunal shall fix the first hearing on a date not beyond one month from the date of receipt of the order of reference and the opposite party or parties shall file their written statement together with documents, and that a list of witnesses within a period of 15 days from the date of first hearing and simultaneously forward a copy thereof to the other party. This rule has never been construed as mandatory. On failure to file the written statement within 15 days from the date of first hearing and simultaneously forwarding copy to the other party, it is left within the discretion of the Tribunal to grant such time in the interest of justice.

Reverting back to the Judgment of the Apex Court in the case of Dr. J.J. Merchant and others (supra), Section 13 of the Consumer Protection Act also provides for filing written statement within a period of thirty days. But the Apex Court has read the said provision as :

'Under this Rule also, there is a legislative mandate that written statement of defence is to be filed within 30 days. However, if there is a failure to file such written statement within the stipulated

> time, the court can at the most extend further period of 60 days and no more. Under the Act, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party. Therefore, the aforesaid mandate is required to be strictly adhered to.'
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> In my opinion, therefore, both rules will have to be read together and so read, Order 5, Rule 1 and Order 8, Rule 1 will not apply to proceedings filed before the Amendment Acts came into force.
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> In **Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2003 SC 189,** the A**pex** Court has gone into issue of various amendments brought to the Code of Civil Procedure. However, neither Order 5, R.1, nor Order 8, Rule 1 has been the subject matter of the said suit.
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> 7. The object of the Amendment Act, however, should not be frustrated. It is ultimately enacted with an object to avoid delays and to see to it that the written statements are filed as expeditiously as possible to give effect to the object of speedy justice and at the same time not to deny a fair opportunity to the litigant. In respect of pending proceedings, as held, Order V, Rule (1) would not apply. If that be the case, as summons was not served in terms of the Amended Order V, Order VIII, Rule (1) will not apply to pending proceedings. However, in such cases, it will be open to the Court to direct the party to file the written statement within the time as contemplated by the amended provision of Order 8, Rule 1 and if the party does not file within such time or at any rate, within the extended period of 90 days, then only the Court can reject an application for filing written statement."

We approve the principle laid down therein. In the instant case, no such notice was given by the Court to the parties and considering that, the mandate of Order 8 of the C.P.C. would not apply.

2. We have also perused the various reliefs as sought for. The trial court after proceeding under Order 8 of the C.P.C. has granted the relief for specific performance; damages, as also the alternate relief, namely the value of the land. The Appellate Court could not have granted both the reliefs. It could only grant specific performance and damages, or the alternate relief, but not both.

3. Order 8 Rule 5 of the C.P.C. read with Rule 10 of the C.P.C. as now interpreted by the Apex Court is that the Court may proceed to decree the suit, or may pass such other order as it thinks fit and proper. The Apex Court in the case of **Balraj Taneja & Anr. vs. Sunil Madan & Anr., (1999)8 SCC 396**, considering the provisions of failure to file written statement under Order 8 Rule 10 and Rule 5(2) of the C.P.C., has observed that the Court ought not to pass judgment solely because a written statement has not been filed. The Court ought to be cautious and only if it is satisfied that there is no fact which needs to be proved despite deemed admission, should proceed to pass judgment. In a suit for specific performance, more specifically in case of a development agreement, the Court ought to have satisfied itself that the issues arising could be disposed of based on the pleadings and no fact was required to be proved. In case of a prayer for damages, even if liquidated, as laid down by the Apex Court, at the highest, that is the maximum to which a party would be entitled. However, a party must establish and

prove damages before they can be awarded or relief granted, unless in the exception as now carved out by the Apex Court, in the case of **Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., 2003(4) Scale 92.** In the instant case the suit **was for** specific performance. In these circumstances the plaintiff has to prove various facts before a decree for specific performance could have been granted, as also the prayer for damages. This would therefore have not been a fit case where the Court ought to have proceeded to decree the suit on failure to file written statement. On failure to file the written statement it is not mandatory on the Court to proceed to pass a decree as observed by the Apex Court in the judgment referred to earlier. On the facts of this case, we are of the opinion that this was such a case where the Court ought not to have passed the decree.

4. At the same time, the agreement is of 1997. The case of the respondents is that the agreement has not been performed; that the defendant no.1 specifically has developed part of the property and sold flats to third parties and in these circumstances this Court ought to impose some conditions on the appellant herein, considering that the suit has been decreed. It will not be possible at this stage to grant the relief as sought. However, it is still open to the respondent nos.1 to 13, if so advised and if Order 38 of the C.P.C. is available, to apply to the trial Court for such reliefs. Liberty to respondent nos.1 to 13 to apply under Order 38 of

the C.P.C. Both the parties have agreed that they will go before a Commissioner for the purpose of recording evidence by way of cross-examination of the witnesses in terms of Order 18 of the C.P.C. In these circumstances, we direct that the suit be disposed of at any rate on or before 31st December, 2003.

In the light of that the following Order:-

(a) The impugned judgment and decree is set aside.

(b) The appellant and respondent no.14 to file their written statements within fourteen days from today. The parties to appear before the trial Court on 5th August, 2003, at 10.30 a.m. for filing written statement and for further directions. All the parties waive notice of the said date and undertake to remain present before the trial Court. On issues being framed the Court will direct the parties to file their evidence on affidavit, according to law and thereafter refer the matter to a Commissioner mutually agreed to by the parties and in the absence of any agreement, to a Commissioner appointed by the Court. Costs of the Commissioner will be shared by the appellant and the respondents equally.

(c) Appeal allowed. In the circumstances of the case there shall be no order as to costs.

Civil Application No.104 of 2003 is disposed of as infructuous.

F. I. REBELLO, J.

P. V. HARDAS, J.

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